IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1503

TEXACO INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION and ESSO STANDARD OIL S.A., LTD., *Petitioners,*

v.

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB, Administrator, Federal Energy Administration, *Respondents,*

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY and COMMONWEALTH OF PUERTO RICO, *Intervenor-Respondents.*

BRIEF FOR THE COMMONWEALTH OF PUERTO RICO, INTERVENOR-RESPONDENT, IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the FEA rule in question should be invalidated for alleged procedural irregularities under 5 U.S.C. § 553.

2. Whether the FEA's interpretation of its own regulations, and the related special provision for Shell P.R., were rationally based.

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STATEMENT

Puerto Rico was specifically included within the reach of the EPAA.[1] Thus, federal price controls on petroleum were for the first time extended to Puerto Rico in the Federal Energy Administration ("FEA") regulations of January 15, 1974.[2] In the exercise of its responsibilities under the EPAA with respect to Puerto Rico, the FEA was from the outset confronted with serious potential economic dislocations caused by Puerto Rico's 99 percent dependence on foreign oil—the price of which had recently increased fourfold. At the same time "old" domestic crude oil, from which about 40 percent of all petroleum products consumed in the U.S. is refined, remained subject to U.S. price controls, resulting in cheaper product prices on the U.S. mainland.

Responding to this situation, the FEA by an order issued May 16, 1974 ("May 16 Order"),[3] in a rulemaking proceeding, applied its "refiner rule" to Puerto Rican marketing subsidiaries of U. S. major oil company refiners. The refiner rule was applied even though such marketing subsidiaries were supplied by CORCO[4]

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[1] The Emergency Petroleum Allocation Act of 1973, 15 U.S.C.A. § 751, *et seq.*

[2] 39 *Fed. Reg.* 1923 (January 15, 1974).

[3] 39 *Fed. Reg.* 17765 (May 20, 1974), (Petition, Appendix ("Pet. App.") pp. 6a-14a).

[4] Commonwealth Oil Refining Company, Inc., a "small" and "independent" refiner, as defined in § 3 of the EPAA, operates solely in Puerto Rico. CORCO refines about 75% of all petroleum products consumed in Puerto Rico but does not engage in retail distribution. Instead CORCO sells products to marketing subsidiaries of major oil companies (Exxon, Texaco, Mobil, Shell, Arco and Chevron) which in turn sell to retail "branded independent dealers." (Pet. App. p. 19a).

at prices reflecting CORCO's exclusive reliance on foreign crude (which naturally exceeded the average cost increases experienced by the mainland refiner parent companies). The effect was to ensure that gasoline prices in Puerto Rico would be compatible with those charged by the refiner parents in the U.S. This was required by the EPAA which instructed the President (and the FEA to which presidential authority and responsibility were delegated) to assure "equitable prices" for petroleum products among all regions of the United States. EPAA, Section 4(b)(1)(F).

At the rulemaking hearings held in April 1974, it was estimated that adoption of the refiner rule would save Puerto Rican consumers about $144 million annually in gasoline and diesel costs. (Pet. App. p. 3a). Absent the refiner rule, gasoline would have sold for 80-85 cents per gallon; with the refiner rule, retail prices averaged about 65 cents per gallon during 1974.

No Petitioner any longer challenges the application of the refiner rule in Puerto Rico.[5] Both the District Court and the Temporary Emergency Court of Appeals ("TECA") concluded that application of the refiner rule in Puerto Rico was a proper exercise of the agency's statutory responsibilities.

This case arose because of Petitioners' resistence to a practical temporary arrangement required by the FEA, in its May 16 Order, respecting The Shell Company (Puerto Rico) ("Shell P.R.") in order to fully effectuate the refiner rule. As FEA read its regulations, Shell P.R. was entitled to be treated as a "re-

[5] Mobil challenged FEA's application of the refiner rule in the District Court which sustained the rule. Mobil abandoned this claim in the appeal to TECA.

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seller" rather than a refiner, and thus directly pass-through dollar-for-dollar CORCO's increased charges for petroleum products. Although Shell P.R. was affiliated with Shell U.S., a refiner, it was not a subsidiary nor was it controlled in any way by Shell U.S. So the FEA concluded it was inappropriate under its regulations to require Shell P.R. to roll-in its cost increases with those of Shell U.S.

To avoid the market disruption which would have been caused if Shell P.R. either could, or could not, pass-through to consumers the much higher costs it was paying CORCO over the average costs of its competitors, (Pet. App. pp. 38a-40a), the FEA determined to work out equitable pricing at the wholesale level by regulating the prices charged by CORCO to all such marketers. Thus, CORCO was directed to reduce its prices to Shell P.R. to a level equating the average cost of gasoline experienced by the marketing subsidiaries of mainland refiners and permitted to recoup such price differential by charging slightly higher prices to the other marketers, including Petitioners. In concept, therefore, CORCO would recoup its increased foreign oil costs dollar-for-dollar; so would Shell P.R. without disrupting the marketplace; and so could the combination of the marketing subsidiary and the mainland parent of Petitioners and the other companies.[6]

The May 16 Order was preceded by notice of rulemaking published in the Federal Register on March 28,

[6] FEA regulations permitted Petitioners to recover all amounts paid CORCO by the marketing subsidiaries in their sales of products nationwide, including Puerto Rico. Any amounts not immediately recouped were "banked" for future recoupment when market conditions permitted. 10 C.F.R. Part 212, Subpart E.

1974, (Pet. App. pp. 3a-5a). Hearings were held in Puerto Rico on April 8 and 9, 1974, after which the hearing record was left open until April 15, 1974 to permit supplemental comments. Representatives of Petitioners participated in the hearings where the precise terms of the Shell differential were described repeatedly. (Pet. App. pp. 67a-73a).

In compliance with the May 16 Order, CORCO reduced its prices to Shell P.R. whose prices to retailers remained competitive. Petitioners, however, either resisted payment to CORCO of the Shell differential, paid under protest or ceased doing business with CORCO and made alternate supply arrangements. FEA's issuance of enforcement orders led to the filing of these suits below and the District Court's entry of judgment adverse to Petitioners. The Temporary Emergency Court of Appeals held that the published notice sufficiently described the scope of the hearings (Pet. App. pp. 66a-67a). It also affirmed the District Court's finding that actual notice of the Shell differential was given at the hearings (Pet. App. p. 68a) and concluded that Petitioners had fair and reasonable opportunity to participate in the rulemaking proceeding as contemplated by the Administrative Procedure Act ("APA") Section 4,[7] (Pet. App. p. 73a). Petitioners now seek a writ of certiorari from this Court to review the decision below.

ARGUMENT

The fundamental outcome of the FEA rulemaking, application of the refiner rule to Puerto Rico, is no longer challenged by Petitioners. The issues presented in this Petition challenge only the Shell differential

[7] 5 U.S.C. § 553.

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and are uniquely narrow, factual and insignificant. Similar issues concerning technical compliance with Section 4 of the APA as well as the question of the deference which should be given the reasoned action of the agency have been before this Court in *De Rieux* v. *Five Smiths, Inc.*, 499 F.2d 1321 (T.E.C.A. 1974), *cert. denied*, 419 U.S. 896 (1974); see also *California* v. *Simon*, 504 F.2d 430 (T.E.C.A. 1974), *cert. denied*, 419 U.S. 1021 (1974). As in these cases, the decision of the Court below was manifestly correct, and this case presents no issues worthy of review by this Court.

I. The Decision Below Was Correct

There is no doubt the published notice was sufficiently broad to engage the attention of Petitioners as well as all other marketers. All sent representatives to the hearings. Although present at the hearings Petitioners suggest the published notice was inadequate for failure to describe specifically the Shell differential. This argument was considered by TECA and rejected as a narrow and technical reading of the notice which ignored the surrounding circumstances and contemporaneous agency actions. (Pet. App. p. 67a).

Petitioners argue here, as they did unsuccessfully below, that the actual notice was defective as a matter of law because it did not meet the APA Section 4(b) technical requirement of service on "named parties." They almost say that anything less than a *Miranda* warning is legally insufficient. Petitioners have divorced the statutory words from the realities of the situation. Even though a change in the agency's rules was contemplated, it only involved the two refiners and seven marketers in Puerto Rico all of which are sophisticated petroleum companies which were present in full force

for the hearings. And the FEA's manner of proceeding approached a trial-type hearing with full oral statements, penetrating questions by the FEA panel (which also put any questions requested by other parties of any particular witness), opportunity for oral rebuttal statements as well as supplemental written submissions (for which the record was kept open an additional week). Clearly then, nothing more could have been accorded Petitioners by "naming" and "serving" them with the notice.

At the hearings the actual notice of the agency position, scope of the problem and the precise Shell differential were presented repeatedly. (Pet. App. pp. 68a-72a). It is inconceivable that these Petitioners were misled. In this unique fact situation the actual notice was fair and reasonable and the Courts below were clearly correct in so holding. (Pet. App. pp. 43a, 73a). And Petitioners' argument to the contrary merely challenges the factually oriented conclusion of both lower courts.

An additional procedural defect propounded is that the agency made the Shell differential immediately effective without ". . . good cause found and published . . ." as provided in Section 4(d) of the APA. But the facts here were properly evaluated by the Courts below and present the classic case for which the "immediately effective" exception was provided. (Pet. App. pp. 44a, 74a-75a). The Court correctly held that failure to publish the good cause, which was established in the record, was "non-prejudicial" and not a sufficient ground to invalidate the rule. (Pet. App. p. 75a). *De Rieux* v. *Five Smiths, Inc., supra; California* v. *Simon, supra.*

Petitioners assert the Courts below erred in deferring to the agency's interpretation of its own regula-

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tions. However, in assessing an agency's interpretation of its regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1944). Here, the agency was clearly justified in limiting exercise of its control over this most complex world-wide industry to those companies doing business in the United States. Therefore, the determination that Shell P.R., because it had no mainland parent, had to be treated differently than the marketing subsidiaries of mainland parents was rationally based.

Petitioners' insinuation that the FEA's removal of the Shell differential some four months later indicates it was invalid from the outset is simply incorrect. The record shows, and the Courts below concluded, that the change in the rule was due to changed circumstances and the FEA's assuring that such change would not adversely affect consumers in Puerto Rico.

II. There Are No Important Questions Presented

Petitioners attempt to suggest far-reaching influence of the decisions below on the administrative process. As important as the case is to the Commonwealth, and to CORCO who has yet to be paid the $8.5 million owed by Petitioners, we doubt the case will imperil our jurisprudence. The Shell differential, though vital to effectuation of an important rule, was itself limited in duration and the procedural questions raised by Petitioners concerning its adoption are mostly factual in nature, and have been adequately resolved in the two thorough opinions of the Courts below.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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